BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 715

RATE REGULATION REFORMS

BNSF RAILWAY COMPANY'S REBUTTAL COMMENTS

BNSF Railway Company ("BNSF") hereby submits its rebuttal comments on the issues addressed in the Board's July 25, 2012 Notice in *Rate Regulation Reforms*, Ex Parte No. 715 ("EP 715 Notice").

In the EP 715 Notice, the Board proposed refinements to its rate reasonableness methodologies in three broad areas (1) Changes to the use of cross-over traffic; (2) Refinements of the Simplified SAC and Three Benchmark methodologies, including changes to relief caps, and (3) Modification of the interest rate used to calculate reparations. After two rounds of comments, the shippers' position on these issues is clear.

As to cross-over traffic, the shippers continue to insist that they are entitled to use cross-over traffic in SAC analyses regardless of the distortions created by cross-over traffic in the SAC results. The shippers continue to ignore the Board's conclusion that cross-over traffic is intended only to simplify SAC analyses, not to produce SAC results that are skewed in favor of shippers that rely heavily on cross-over traffic in their SAC presentations As to the Board's proposed refinements to the simplified methodologies, the shippers urge the Board to eliminate all restrictions on the eligibility to use the simplified methodologies while resisting the Board's efforts to make the results of those approaches more accurate The shippers wrongly seek to make the simplified methodologies available as alternatives to SAC rather than as a limited

supplementation of the Board's SAC methodology in cases that do not justify the cost of SAC litigation. As to the interest rate on reparations, the shippers support an increase in the interest rate used to calculate reparations

In all three areas, the shippers are driven by a simple desire to expand rate relief without regard to the economic principles underlying the Board's regulation of rail rates or the framework that the Board and Congress have established for assessing the reasonableness of rail rates. The shippers' approach to the issues raised in the EP 715 Notice is unabashedly result-oriented and unprincipled. BNSF has already addressed on opening and reply most of the arguments made and positions taken by the shippers in this proceeding. BNSF addresses below the small number of new arguments made by the shippers in their reply filings.[1]

I. Issues Relating to Cross-Over Traffic

A. Cross-Over Traffic Should Be Eliminated In Full SAC Cases.

As BNSF explained in its opening comments, cross-over traffic was adopted by the ICC as a simplification device at a time when there was no simplified alternative to a Full SAC analysis. Now that the Board has adopted a Simplified SAC methodology that gives shippers the opportunity to present simplified SAC assumptions with appropriate limits on relief to compensate for the inaccuracies that inevitably result from the use of simplifying assumptions, it would be appropriate for the Board to restrict the use of cross-over traffic to Simplified SAC presentations The Full SAC methodology should be used as originally contemplated by the ICC as a test for a true "stand-alone" railroad that is not dependent on the residual incumbent to provide service to the traffic group that is served by the SARR

[1] BNSF does not address comments regarding matters raised by shippers that are outside the scope of this proceeding, including the proposal to "define and apply the revenue adequacy constraint." *See* CURE Reply at 3.

The primary response of the shippers to BNSF's proposal is that the restriction on the use of cross-over traffic in Full SAC analyses violates a complainant's "right" to include cross-over traffic in the SAC analysis and that any limits on the use of cross-over traffic would "violate a fundamental tenet of *Coal Rate Guidelines.*"[2] The Board has previously rejected the claim that "under *Guidelines*, complainants have an absolute right to use cross-over traffic and to choose any segment of the incumbent's market they wish the SARR to serve." *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1), at 31 (STB served Oct. 30, 2006). *Guidelines* makes no mention of cross-over traffic, and as the Board noted, "it is clear that the concept of cross-over traffic was not contemplated by the ICC when it adopted Guidelines." *Id.* at 31. Cross-over traffic was subsequently adopted as a simplification device, not because complainants have the "right" to include in the SAC analysis only a portion of the transportation service that the defendant provides in the real world to shippers served by the SARR.[3]

Coal Shippers argue that *Guidelines* must have contemplated the use of cross-over traffic since two cases decided shortly after *Guidelines* – the *OPPD* and *APL* cases[4] – allowed the complainants to avoid constructing all facilities necessary to provide service to the SARR's traffic group. But those cases did not involve the use of cross-over traffic in the way that cross-

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[2] Consumers United for Rail Equity ("CURE") Reply at 7, 21-22.

[3] Coal Shippers suggest that their "right" to use cross-over traffic is related to the complainant's right to group traffic with the issue traffic. *See* Western Coal Traffic League, Concerned Captive Coal Shippers, American Public Power Association, Edison Electric Institute, National Rural Electric Cooperative Association, Western Fuels Association, Inc., and Basin Electric Power Cooperative, Inc. ("Coal Shippers") Reply at 13. But the elimination of cross-over traffic does not restrict in any way the traffic that the complainant can include in the SAC analysis. The complainant would just be required to provide the same origin-to-destination service for the traffic included in the SAC analysis that the defendant provides in the real world.

[4] *Omaha Pub. Power Dist. v. Burlington N. R.R. Co.*, 3 I.C.C.2d 123, 142 (1986) ("*OPPD I*"), *aff'd*, 3 I.C.C.2d 853, 858 (1987) ("*OPPD II*"); *Ark. Power & Light Co. v. Burlington N. R.R. Co.*, 3 I.C.C.2d 757, 774 (1987) ("*APL*").

over traffic has been used in recent cases. In *OPPD*, the ICC allowed the complainant to avoid replicating feeder and distribution lines used to provide service to the traffic group in the SAC analysis because the ICC concluded that the evidence showed that there was a "complete recovery of all stand-alone costs, including auxiliary costs and investment" on those lines.[5] In contrast, the Board does not require that a complainant using cross-over traffic show that off-SARR costs are fully covered. Indeed, the purpose of cross-over traffic as it is used today is to *avoid* any consideration of whether the off-SARR costs are covered on the theory that it is too complicated to make such a showing. If anything, the ICC's early decisions show that the ICC did not contemplate the use of cross-over traffic to create a SARR that is dependent on the residual incumbent to provide service to the SARR traffic group without any inquiry into whether the residual defendant's costs are fully covered.

Coal Shippers also claim that complainants should be allowed to use cross-over traffic in Full SAC cases because it would be too complicated to present SAC evidence without the use of cross-over traffic. Coal Shipper Reply at 11 ("cross-over traffic is essential to make the SAC test work"). This concern is misplaced. While the elimination of cross-over traffic could expand the scope of a SARR and require somewhat more expansive operating and construction cost evidence, it would also have the offsetting effect of eliminating litigation over the most complex SAC issues that have arisen in recent SAC cases. As BNSF explained in its opening comments, cross-over traffic was intended to simplify Full SAC litigation, but the use of cross-over traffic has in fact led to the most complex and contentious issues in recent SAC cases, including the

[5] *OPPD I*, 3 I.C.C 2d at 142; *see also OPPD II*, 3 I.C.C.2d at 858 (concluding that the record demonstrated "a complete recovery of all stand-alone costs, including off-line costs and investment"). *See also APL*, 3 I.C.C 2d at 774 ("APL developed a second SAC model designed solely to illustrate that the non-issue traffic included in the trunk line model earns sufficient revenues to cover off-line, as well as on-line costs.").

need to develop appropriate methodologies to allocate revenues between the SARR and the residual defendant and the need to address unrealistic operating assumptions and SARR configurations that result from complainants' use of cross-over traffic.[6] Elimination of cross-over traffic from Full SAC analyses could actually simplify SAC cases by forcing complainants to make more realistic assumptions that can be more easily assessed by defendants and by the Board

B. If the Board Does Not Eliminate Cross-Over Traffic In Full SAC Cases, It Is Reasonable For The Board To Limit The Use of Cross-Over Traffic.

BNSF believes that the appropriate way of dealing with the distortions created by the use of cross-over traffic in Full SAC cases is to limit the use of cross-over traffic to Simplified SAC cases However, if the Board does not eliminate cross-over traffic altogether from Full SAC cases, BNSF agrees with the Board that limits should be imposed on the use of cross-over traffic to address the substantial distortions created when carload traffic is used as cross-over traffic in SAC analyses.

The shipper commenters oppose any limits on cross-over traffic on several grounds. First, they argue that any limit on the use of cross-over traffic would interfere with their supposed "right" to use cross-over traffic. BNSF addressed above the shippers' claim that they are entitled to use cross-over traffic in SAC analyses. BNSF also addressed above the shippers'

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[6] *See, e g., E.I. du Pont de Nemours & Co v. Norfolk Southern Ry Co.*, STB Docket No NOR 42125 ("leapfrog" cross-over traffic where the SARR hands traffic back and forth to the incumbent multiple times), *Arizona Elec. Power Coop., Inc v BNSF Ry. Co*, STB Docket No. NOR 42113 (STB served Nov. 16, 2011) (complainant ignored the interchange point between defendants and rerouted the interline issue traffic over lines that have never been used by defendants to provide the transportation service, which resulted in inefficient and circuitous routing of the issue traffic), *appeal docketed*, No 12-1246 (D C Cir June 8, 2012); *Tex. Mun. Power Agency v Burlington N & Santa Fe Ry Co.*, 6 S.T.B. 573, 596-98 (2003) (complainant's assumed rerouting of unit coal trains through the heavily congested Houston area)

argument that any limits on cross-over traffic would necessarily result in "unmanageably large, complex and expensive" SAC analyses.[7]

In addition, the shippers argue that the Board's concerns about the distortions created by the use of carload traffic as cross-over traffic are misplaced. The shippers claim that the Board's concerns about the distortions created by the use of carload traffic as cross-over traffic result from the Board's focus on the operations of the SARR, while the Board is supposed to be focused only on the defendant's costs for purposes of allocating revenue between the SARR and the residual incumbent.[8] But the shippers mischaracterize the Board's concern.

As BNSF explained in its reply comments, the distortions from the use of carload traffic as cross-over traffic arise from the fact that complainants usually carve out a highly efficient portion of the defendant's real world carload movements for inclusion in the SAC analysis.[9] However, the defendant's system-average URCS costs are then used to estimate the cost of that efficient portion of the defendant's movement. URCS was not designed to assess the costs of a portion of a through movement. URCS is a system-average cost methodology that is designed to estimate the average costs of the entire through movement. When costs are relatively evenly spread out over a movement, as in the case of trainload traffic, URCS can be used to produce a reasonable estimate of the cost of a selected portion of the through movement. But the costs to provide carload transportation are not evenly spread out over the through movement, since carload traffic requires substantial gathering, switching, assembly and disassembly activities at different points in the movement. While system-average URCS costs may produce a reasonable

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[7] Coal Shippers Reply at 6.

[8] *See* Coal Shippers Reply at 7-8.

[9] BNSF Reply at 16-18.

estimate of the average costs of the entire through movement for carload traffic, it does not reasonably estimate the costs of a highly efficient portion of the through movement. The magnitude of the distortion cannot be assessed by looking only at a single element in the URCS system-average cost calculation, like inter- and intra- train ("I&I") switching.

Coal Shippers argue that the problems resulting from the use of system-average URCS costs to estimate the cost of an efficient segment of a carload movement can be addressed by adjusting the URCS variable cost calculations to account for the specific characteristics of the segment of the movement at issue. While such an approach may be theoretically possible, the Board has made it clear that it will not consider adjustments to URCS to account for specific movement characteristics *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1), at 50-51 (STB served Oct. 30, 2006). Moreover, experience with movement-specific URCS adjustments in past SAC cases shows that any attempt to adjust URCS would likely lead to further disputes and complications that the use of cross-over traffic was intended to avoid.

C. The Board Should Adopt Its Proposed Alternative ATC Methodology.

BNSF has explained in detail in its opening and reply comments in this proceeding and in the *WFA/Basin* rate case[10] why the Board's adoption of Modified ATC was unnecessary to address the Board's concerns with Original ATC and why Modified ATC conflicts with the principles that the Board established in *Major Issues* for the proper allocation of revenue on cross-over traffic.[11] BNSF has also explained how the Board's Alternative ATC addresses the flaws in Modified ATC BNSF does not repeat that discussion here.

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[10] *W. Fuels Ass'n, Inc. & Basin Elec. Power Coop. v. BNSF Ry. Co.*, STB Docket No. 42088 ("*WFA/Basin*").

[11] BNSF Opening at 13-15; BNSF Reply at 18-23 *See, e.g.*, Comments of BNSF Railway on Remand, STB Docket No. 42088, at 11-16 (filed on Nov 22, 2012) On June 15, (Continued...)

The only new argument raised in the shippers' reply comments on the issue of Modified ATC is in the comments of the Joint Chemical Companies. The Joint Chemical Companies argue that the railroads' concern that Modified ATC can be used to manipulate SAC results is misplaced because Modified ATC is a formula and therefore it "cannot be manipulated."[12] According to the Joint Chemical Companies, the railroads' real concern is with traffic grouping (where complainants supposedly have broad flexibility), not with the revenue allocation methodology.

The argument misses the point. The problem with Modified ATC is with the formula used in Modified ATC to allocate revenue. As BNSF has explained, the Modified ATC formula fails to give proper weight to variable costs in allocating revenues on cross-over traffic.[13] By giving too much weight to variable costs, Modified ATC unduly favors the high-density portion of a cross-over movement in the allocation of revenue, thereby giving complainants the incentive to manipulate the SAC results by designing a stand-alone railroad that replicates only high-density portions of a railroad defendant's network But whether or not the complainant tries to manipulate the SAC analysis through its design of a SARR and the traffic group included in the SAC analysis, Modified ATC produces distorted SAC results for the simple reason that the formula used to allocate cross-over revenues under Modified ATC fails to accurately assess the on-SARR and off-SARR costs of a through movement. The formula is flawed and should be

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2012, the Board issued a decision on remand in the *WFA/Basin* case in which the Board adhered to its use of Modified ATC in that rate case while noting that it was going to initiate a rulemaking for purposes of replacing Modified ATC BNSF has appealed the Board's June 15, 2012 decision. *See BNSF Railway Co. v. STB*, Docket No. 12-1327 (D.C. Cir.).

[12] The American Chemistry Council, The Fertilizer Institute, The National Industrial Transportation League, Arkema, Inc., The Dow Chemical Company, Olin Corporation, and Westlake Chemical Corporation ("Joint Chemical Companies") Reply at 6.

[13] BNSF Opening at 14, BNSF Reply at 18.

replaced with an approach that better accounts for the relative costs of the on-SARR and off-SARR portions of a through movement.

II. Issues Relating To The Simplified Rate Reasonableness Methodologies

A. Relief Caps Should Not Be Eliminated.

On reply, the commenting shippers continue to assert that relief caps should be eliminated in Three Benchmark and Simplified SAC ("SSAC") cases.[14] Their argument on reply for eliminating relief caps is the same as the argument they presented in their opening comments, namely that relief caps are not necessary because shippers already have an incentive to bring a rate case under the most accurate methodology possible. They claim that the level of a prescribed rate necessarily will be higher under a more simplified methodology, so shippers already have the incentive to choose the more accurate methodology if the litigation costs can be justified.

BNSF has already addressed the shippers' argument, showing that there simply is no empirical or theoretical support for the claim that the level of any prescribed rate will necessarily go up as a more simplified methodology is used. As to Simplified SAC cases, there have been no cases decided under the SSAC methodology, so it is not possible to know how cases under that methodology will come out. As to Three Benchmark cases, the factors used in a Three Benchmark analysis have nothing in common with the inputs and assumptions used in a Full SAC or SSAC analysis, so there is no reason to assume any relationship whatever between the

[14] Chlorine Institute Reply at 6; CURE Reply at 20; ARC Reply at 3, 7, Joint Chemical Companies Reply at 7, 8; Coal Shippers at 20-21; NGFA Reply at 8. Some shippers also urged the Board to expand relief available in a SSAC case by extending the rate prescription period in SSAC cases to ten years. Chlorine Institute Reply at 4, 6; NGFA Reply at 6. It would be inappropriate to provide 10 years of relief in a SSAC case since the rate prescription is based on a single Test Year. *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), at 15-16 (STB served Sept. 7, 2007).

results of a Three Benchmark case and a SAC or SSAC analysis. Indeed, BNSF explained that the use of the Three Benchmark analysis in cases involving traffic on low density line segments could well produce results suggesting that the challenged rate exceeds a reasonable maximum rate when a SAC analysis would show that the rate is reasonable.[15] In such a case, the complaining shipper would have an obvious incentive to avoid the use of the SAC test and instead to rely on a Three Benchmark analysis because the Three Benchmark analysis would produce better results for the complainant.[16]

BNSF has acknowledged that an increase in the relief cap for Three Benchmark and SSAC cases could be appropriate as part of a package of changes to the Board's rate reasonableness methodologies. However, the cap on relief under the simplified methodologies should not be eliminated under any circumstances Therefore, BNSF does not support the Board's proposal to eliminate the cap on relief for SSAC cases, even if the Board makes other improvements in its rate reasonableness methodologies.

As BNSF explained, the elimination of the relief cap in SSAC cases could lead to an abuse of the SSAC methodology by shippers that have very low litigation costs in SSAC cases. The railroad defendant is responsible for most of the litigation costs and burdens of a SSAC case, so a shipper could bring an unmeritorious claim, or threaten such a claim, simply to gain an

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[15] BNSF Reply at 7.

[16] In addition, as AAR has explained, the statute does not permit an approach that gives the complaining shipper a choice as to the methodology it would like to pursue. The statute provides that simplified methodologies are supposed to be reserved for cases where the value of the case does not justify the use of the more accurate SAC standard. 49 U S.C. § 10703(d)(3) Moreover, the Board fails to explain how the proposed elimination of a relief cap in SSAC cases would be consistent with the Board's conclusion in *Simplified Standards* that some limit on relief was required by statute *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), at 27, 85 (STB served Sept 7, 2007) (adopting a "small claims model" of relief limits to determine the eligibility to use the simplified methodologies in response to "our directive from Congress" under 49 U.S.C. § 10703(d)(3)).

unjustified advantage in a commercial discussion. Elimination of the cap on relief would encourage such a misuse of the SSAC methodology [17] The Joint Chemical Companies argue that this concern is unfounded since there is no evidence that the SSAC methodology has been abused in this way.[18] But the lack of any evidence of abuse in the past may well be due to the existence of a relief cap that makes it less attractive to bring unmeritorious SSAC cases BNSF's point was that elimination of the relief cap could lead to abuse in the future, and the shippers do not have a response to that concern. BNSF also argued that elimination of the cap on relief under the SSAC methodology would be especially inappropriate in light of the complete lack of experience with the SSAC cases. The shipper commenters ignored this argument altogether.

The Board did not propose eliminating the cap on relief under the Three Benchmark methodology, but several shippers suggested that the relief cap should be removed not just under the SSAC methodology but also in Three Benchmark cases BNSF explained that removing the relief cap on Three Benchmark cases could have the prohibited ratcheting down effect on rail rates that was identified as a problem by the D C. Circuit in *McCarty Farms* and recognized by the Board in *Simplified Standards*.[19] If the relief caps on Three Benchmark cases were removed, the repeated use of the Three Benchmark methodology would lead to spiraling declines in average rate levels as each new calculation of the average rate level declined because the higher-than-average rates had been eliminated from the comparison group sample [20] Indeed, one of the reasons the Board established relief caps in the first place was to avoid this ratcheting down

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[17] BNSF Opening at 16; BNSF Reply at 4-6.

[18] Joint Chemical Companies Reply at 7.

[19] BNSF Reply at 7-8 *See also* AAR Reply at 15-16; *Burlington N. R.R. Co v. ICC*, 985 F 2d 589, 597 (D.C. Cir. 1993) ("*McCarty Farms*"), *Simplified Standards*, at 73-74.

[20] BNSF Reply at 7-8

effect. *Simplified Standards*, at 74 ("[T]he potential for ratcheting will be severely constrained by the limit on the relief available under this approach."). The response of the Joint Chemical Companies and NGFA is that there have been too few Three Benchmark cases in the past for the ratcheting down effect to be a concern [21] The argument again misses the point. The elimination of the cap on relief would likely lead to a much expanded use of the Three Benchmark methodology, which would in turn have the prohibited ratcheting down effect.

B. The Board Should Refine The Simplified SAC Methodology To Require Full Calculation Of Road Property Costs.

BNSF supports the Board's proposal to refine the SSAC methodology to require a full calculation of road property investment costs rather than rely on the average costs from prior Full SAC cases. The shippers oppose the Board's proposal for the simple reason that it would make the presentation of SSAC evidence more costly [22] But the modest increase in the cost to present SSAC evidence would be justified by the improvement in the accuracy of the SSAC results. Moreover, as BNSF indicated in its opening comments, BNSF would not be opposed to a modest increase in the relief limit available in a SSAC case as part of a package of refinements that would improve the accuracy of Full SAC calculations (by eliminating cross-over traffic) and SSAC calculations (by modifying the ATC calculations and increasing the accuracy of road property cost estimates).

III. The Board Should Not Change The Interest Rate Paid On Reparations.

There are two fundamental flaws with the Board's proposal to change the interest rate paid on reparations First, the Board proposes to change a long-standing rule with no

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[21] Joint Chemical Companies Reply at 8-9; NGFA Reply at 7.

[22] CURE Reply at 17; Chlorine Institute Reply at 2, ARC Reply at 2, 8; NGFA Reply at 4, Coal Shippers Reply at 20-21.

examination of the policy or economic principles that might justify a departure from established precedent. The Board is proposing to change the interest rate based on little more than its desire to have a different and higher interest rate applicable to reparations. Such a result-oriented approach is inherently arbitrary. The Board's approach also makes it impossible for commenting parties to address the proposal in a meaningful way Since the parties do not know the Board's economic or policy justifications for the new rule, it is impossible to consider whether those justifications are appropriate

The Board's Notice provides no explanation as to why the Board is "concerned that the T-Bill rate (currently at 0.10%) may be insufficient" or why the U S. Prime rate "may serve as a more appropriate rate for calculating interest owed to shippers." EP 715 Notice at 18. The parties cannot address the validity of the Board's proposal without knowing why the Board believes a change may be needed or what policy or economic principles the Board believes are at issue. Indeed, the Board's proposed rule change is based only on the Board's speculation that a different interest rate "may" be appropriate, rather than a conclusion the Board has reached (even a tentative conclusion) based on its review of relevant factors.[23] A valid change to the long-standing rule on interest rates would require a more complete examination of the underlying issues than is possible based on the terse and uninformative Notice that the Board issued here [24]

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[23] Coal Shippers refer to the FERC's decision to use the prime rate to establish interest payments. Coal Shippers Reply at 23-24. But as Coal Shippers themselves acknowledge, the FERC's decision was based on an examination of specific policy objectives and a conclusion that its choice of interest rates would advance those policy objectives. The Board has proposed no framework at all here for evaluating alternative interest rate proposals, suggesting only that a change "may" be appropriate

[24] For example, some shippers support the Board's proposal based on their view that the U.S. Prime rate is closer to the shippers' opportunity cost than the T-Bill rate. *See* Joint Chemical Companies Reply at 9 But the Notice does not indicate whether the Board's proposal is based on the Board's view that an opportunity cost approach is appropriate, or if so, why such

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The record in this proceeding could not support such a substantial change in long-standing precedent.

The second flaw is that the proposal to adopt a higher interest rate would be unfair to railroad defendants who could be forced to pay substantial amounts of interest to shippers as a result of case delays that are no fault of the railroads. Indeed, BNSF believes that Congress intended to limit railroads' exposure to the costs and uncertainties caused by delays in rate litigation by requiring that Board proceedings be completed within three years The Board has taken the view that the statutory three-year limit on proceedings set out in 49 U.S.C. §11701(c) does not apply to rate reasonableness cases [25] As a result, rate reasonableness proceedings may last for several years. But if the Board is not required to terminate rate proceedings after three years. it is unfair to railroad defendants to experience increased exposure to the uncertainties of rate litigation by allowing cases to extend beyond three years and also holding railroads responsible for potentially large interest payments on any reparations ultimately found to be owing to the complainant as a result of litigation delays.

Moreover. under the Board's proposed approach, the risks and costs associated with the case delays would fall solely on railroads. While a rate reasonableness case is pending, the use of the revenues received from the complainant may be restricted in light of the possibility of an order requiring reparations. If the railroad wins the rate case, any opportunity costs resulting from the restrictions on the railroad's use of the revenues while the case was pending would never be compensated. On the other hand, if the shipper prevails, the shipper would be

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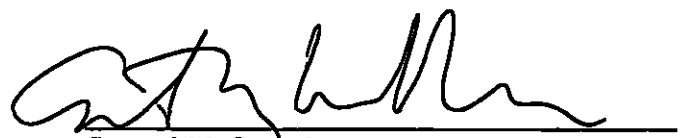
an approach would be appropriate Without knowing the reasons that the Board seeks to change the interest rate – other than the Board's subjective view that the T-Bill rate is too low – it is not possible to address the reasonableness of the Board's proposed rule change

[25] *See BNSF Ry Co. v. STB*, 453 F.3d 473, 478 (D.C. Cir 2006)

compensated for its opportunity costs regardless of the length of time that the case was pending. Such a one-sided approach to allocating the costs of delay would be arbitrary and inappropriate.

Respectfully submitted,



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January 7, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January, 2013, I caused a copy of the foregoing to be served by first-class mail, postage prepaid, upon each party who has filed a notice of intent to participate.

Kathryn J. Gainey